الجامعة الملكية للبنات

ROYAL UNIVERSITY FOR WOMEN

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أول جامعة خاصة **"معتمدة من مجلس التعليم العالي"**

Memorandum for RESPONDENT

On behalf of	**Against**
Comestibles Finos Ltd	Delicatesy Whole Foods Sp
Mediterraneo (RESPONDENT)	Equatoriana (CLAIMANT)

Amina Abdulla • Omaima AlAbbasi • May Alfadhel • Raghad Alotaibi • Eman AlSarraf • Asya Bukhowa • Noof Janahi • Raneem Kadhem

Riffa, Bahrain

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ABA	American Bar Association
Art.	Article
CCS	Code of Conduct for Suppliers
CISG	United Nations Convention on Contracts for the nternational Sale of Goods
CISG Digest	United Nations Convention on Contracts for the nternational Sale of Goods Digest
Cl.	Clarification
Corp.	Corporation
et al.	Et alii (and others)
Exh.	Exhibit
GBP	Global Business Philosophy
GC	General Conditions
GLC	Global Compact
GLC Principles	Global Compact Principles
i.e.	Id est (that is)
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
LP	Limited partnership

Ltd	Limited
MfC	Memorandum for Claimant
Mr.	Mister
Ms.	Miss
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p./pp.	Page/pages
para/paras.	Paragraph/paragraphs
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
R.	Record
SC	Standard Conditions
Tribunal	Arbitral Tribunal
UAR	UNCITRAL Arbitration Rules (as revised in 2010)
UML	UNCITRAL Model Law on International Commercial Arbitration (as revised in 2006)
UML Digest	UNCITRAL Model Law on International Commercial Arbitration Digest (2012)
UPICC/UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts

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LEGAL SOURCES

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Awards, New York, 1958
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rule as revised in 2010, Vienna
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna, 2008
UNGCP	United Nations Global Compact Principles, New York, 2011
UPICC/UNIDROIT	UNIDROIT Principles of International Commercial Contracts, Rome, 2016

STATEMENT OF FACTS

The Parties to this arbitration are Comestibles Finos Ltd [hereafter: RESPONDENT] and Delicatesy Whole Foods Sp [hereafter: CLAIMANT], collectively referred to as 'parties'.

RESPONDENT is a leading supermarket chain in Mediterraneo. CLAIMANT is a medium sized manufacturer of bakery products registered in Equatoriana. Both are Global Compact members

10 March 2014	RESPONDENT sends an invitation to tender for the delivery of chocolate cakes to CLAIMANT, after RESPONDENT's Head of Purchasing, Ms. Annabelle Ming, met CLAIMANT's Head of Production, Mr. Kapoor Tsai, at the yearly Danubian food fair Cucina.	*R. Exh. C 1, p. 8; C 2, p. 9*
17 March 2014	CLAIMANT sends a Letter of Acknowledgement confirming its intention to reply to RESPONDENT's tender in accordance with the Tender Documents received.	*R. Exh. R 1, p. 28*
7 April 2014	CLAIMANT is awarded the contract after accepting the application of RESPONDENT's General Conditions of Contract and Code of Conduct for Suppliers.	*R. Exh. C 5, p. 17*
1 May 2014	CLAIMANT delivers the chocolate cakes throughout 2014, 2015, 2016.	*R. p. 25, para. 13*
6 January 2016	A special rapporteur investigating for UNEP releases a report about the deforestation in Ruritania, denouncing the corruption in various public authorities responsible for the protection of the biodiversity in that area.	*R. Exh. C 7, p. 19*
19 January 2016	Equatorian state news denounced the falsification of certificates for environmental production in Ruritania.	*R. p. 26, para. 14*

23 January 2017	Michelgault, leading business paper in Equatoriana, reports news on the forgery of many certificates attesting sustainable production methods for the cocoa beans in Ruritania. RESPONDENT read the news and was compelled to start an investigation.	*R. Exh. C 7, p. 19*
27 January 2017	RESPONDENT sends an email to CLAIMANT, requesting clarifications on whether its suppliers are involved in the Ruritania scandal. CLAIMANT replied by stating its belief that the suppliers of cocoa beans were not affected.	*R. Exh. C 6, p. 18*
10 February 2017	CLAIMANT confirms RESPONDENT's fears about the unsustainable cocoa beans. To escape from liability, CLAIMANT alleged, for the first time, the contract was governed by its own Conditions of Sale and not RESPONDENT's General Conditions as incorporated in the Tender's Documents.	*R. Exh. C 9, p. 21*
17 February 2017	RESPONDENT terminated the contract due to CLAIMANT's breach of its obligation of results to produce goods conforming with the high ethical and environmental standards, as agreed upon by the parties. Moreover, due to the huge damages suffered, RESPONDENT informed CLAIMANT that it would set-off the alleged payment claims against its RESPONDENT's claims for damages.	*R. Exh. C 10 p. 22*
30 May 2017	RESPONDENT and CLAIMANT try to settle the dispute by mediation, but no amicable solution was reached.	*R. p. 3, line 1*
30 June 2017	RESPONDENT receives Notice of Arbitration from CLAIMANT, according to the dispute resolution clause agreed upon by the parties.	*R. Exh. C 2, p. 12, para. 5*

SUMMARY OF ARGUMENTS

"A breach in trust brings mistrust, followed by a multitude of troubles." — Pawan Mishra

1. How dare thee, CLAIMANT? How dare thee, abhor the character of RESPONDENT by sending non-conforming chocolate cakes! But fret not — the truth shall be revealed. Accusations fled the market regarding CLAIMANT's fraudulent goods, having its impact on RESPONDENT. But the latter will not stand for this. That is why, in first instance, it has raised a challenge against Mr. Prasad, on which the Tribunal is the only competent to decide, because the parties excluded the involvement of any arbitral institution. Moreover, Mr. Prasad shall not partake in the decision as his participation conflicts with the *lex arbitri* and the *lex loci arbitri* **[ISSUE 1]**.
2. Mr. Prasad's partiality and dependence constitutes a serious conflict of interest that Respondent cannot tolerate. In retrospect to the correspondences, Mr. Prasad portrays grounds of bias towards RESPONDENT, due to his relationship with CLAIMANT its third-party funder. Under all the laws applicable to the case, this relationship forms the basis for justifiable doubts that cannot be overlooked. Time is the essence and, therefore, RESPONDENT promptly challenged the partial arbitrator **[ISSUE 2]**.
3. Disregarding CLAIMANT's groundless allegations, RESPONDENT's Tender Documents are the Bible of the contractual relationship and, thus, it can only be considered as an offer. Since the Tender Documents included the General Conditions and the Code of Conduct for Suppliers, along with RESPONDENT's General Business Philosophy, they are the prevailing documents. Indeed, CLAIMANT only made minor modifications regarding the type of the chocolate cakes and the payment terms. Such modifications have been incorporated into the documents, meaning that they do not constitute a counter-offer, but acceptance with slight alterations **[ISSUE 3]**.
4. CLAIMANT and RESPONDENT are both members of Global Compact. However, CLAIMANT did not abide by the principles set forth by this UN Agency, since the cakes were not produced by employing environmentally sustainable standards. As confirmed by the CISG and the UNIDROIT Principles, CLAIMANT delivered non-conforming chocolate cakes, breaching the specifications agreed upon by the parties. Consequently, CLAIMANT is the only one responsible for the breach of contract and cannot argue for an exemption from liability, blaming its supplier for the fraudulent conduct that affected the quality of the Queen's Delight cakes **[ISSUE 4]**.

ARGUMENT ON THE PROCEEDING

ISSUE 1: THE TRIBUNAL SHALL DECIDE ON MR. PRASAD'S CHALLENGE WITHOUT HIS PARTICIPATION

5. RESPONDENT raised a challenge against Mr. Prasad due to his lack of impartiality and independence, following the concealment of substantial information [*R. p. 38, para. 3*]. As a consequence, the decision shall be undertaken by the Tribunal **(A)**, but Mr. Prasad shall not partake in the proceeding **(B)**. Indeed, in the dispute resolution clause, the parties agreed that any dispute would have been settled without resorting to any arbitral institution [*R. p. 39, para. 8*].

A. The Tribunal Has the Authority to Decide on the Challenge According to the Procedural Law

6. Under the arbitration clause, the Tribunal is the only competent authority to decide on the challenge **(I)**. As a result, the PCA cannot act as an appointing authority, also considering that the parties excluded, by mutual consent, the involvement of arbitral institutions **(II)**. Moreover, contrary to CLAIMANT's allegations, the *Contra Proferentem* rule is not applicable to the case at hand **(III)**.

I. Under the Arbitration Clause the Tribunal is Entrusted with the Power to Decide on the Challenge

7. The challenge falls within the arbitration agreement as adhered to the parties' consensus. Furthermore, since the arbitration agreement is resulting from the free will of the parties, the arbitral proceeding shall be conducted in accordance to such will. In fact, the arbitration agreement, which represents sovereignty for CLAIMANT and RESPONDENT, is the triumphing pillar in the proceedings. This leads to the conclusion that the Tribunal has, undoubtedly, the authority to decide on the matter.

a) Party Autonomy is the Cornerstone of the Arbitral Proceeding

8. Party autonomy is what dominates all the steps of arbitration and is considered as a "basic principle in international commercial arbitration…it is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations" [*Redfern & Hunter*, 2009]. Such principle is incorporated by Art. 19(1) UML, which states that "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in

conducting the proceedings". Therefore, it is clear that parties' autonomy is of great and distinctive importance in altering the pathway of arbitration [*UML Digest*]. The importance of the party autonomy lays behind it being one of the main pillars of the arbitration system [*Chatterjee*, 2003].

b) The Parties Agreed that any Dispute, Controversy or Claim Shall Be Settled by Arbitration

9. The parties clearly stipulated in their arbitration agreement that "any disputes, controversy or claim… shall be settled by arbitration" [*R. Exh. C 2, p. 12, Clause 21: Confidentiality*]. Thus, emphasizing that the challenge, whether it is considered as dispute, controversy or claim, falls within the agreement and, accordingly, shall be disentangled by arbitration and by the Tribunal. "If parties wish to go to arbitration they must express this intent clearly and unambiguously. To be valid, the agreement should also be evidenced in writing and signed to ensure its validity according to the applicable law" [*Kröll, et. al,* 2003]. This is further proven by referring to a Canadian court, which ruled that "An arbitration agreement (which) provides for the arbitration to be dealt with on written submissions" [*Desputeaux v. Éditions Chouette (1987) Inc*. 2003]. Thus, the challenge falls within the consented arbitration clause.

c) The Parties' Intention to Include the Challenge Shall Be Interpreted Pursuant to Art. 8 CISG and Art. 4 UNIDROIT Principles

10. In case of disagreement, the intention of the parties can be interpreted not only through the procedural law, but also by applying the substantive law, and specifically Art. 8 CISG. As per Art. 8(1) CISG, "statements made by and other conduct of the party are to be interpreted according to his intent where the other party knew or could have not been unaware what that intent was". By applying this provision, it is clear that the parties' intention was to include the challenge within the scope of the arbitration agreement, whether it was an implicit or explicit agreement. It has been ruled by a U.S. Court that "Article 8(1) permits a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent" [*MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A*, 1998]. This is further confirmed by Art. 4(1) UPICC, which encompasses the principle that the common intention of the parties prevails and, in the case at hand, the common intention of the parties was to settle all the disputes by arbitration.

11. In the case Art. 8(1) CISG is not sufficient to clarify such circumstances, the CISG provides for the reasonable person test according to Art. 8(2) CISG, on the basis of which "The parties' intent is to be considered foremost (Article 8(1) CISG) followed by a reasonable person's understanding (Article 8(2) CISG)" [*Müller-Chen & Pair*, 2011]. Therefore, taking into consideration CLAIMANT's head of production declaration that "We are certain that we will be able to overcome any problems relating the constitution of the arbitral institution" [*R. p. 15, para. 4*], any reasonable person in the place of RESPONDENT would conclude that CLAIMANT's intention was an unconditional exclusion of arbitral institutions, contrary to the allegations of the opposing party [*MfC, p. 15, para. 34*].
12. If any doubt is left, the general criterion established under Art. 8(3) CISG shall be adhered to as a measurement to portray the real intentions of the parties. "To determine the parties' intent, contractual negotiations, established practices between the parties, trade usages and any subsequent conduct (Article 8(3) CISG) may be drawn upon" [*Müller-Chen & Pair*, 2011]. However, opposite to CLAIMANT's allegations, this is not further supported by Art. 4(3) UPICC [*MfC, p. 12, para. 6*]. Accordingly, the challenge falls within the scope of the arbitration agreement as there was a clear intention to include it in the arbitration clause [*R. Exh. C 2, p. 12, Clause 20: Dispute Resolution*].

d) Moreover, all the Disputes Which May Arise Between the Parties Fall Within the Scope of the Arbitration Agreement According to Art. 7 UML

13. The competence of the Tribunal to decide on the challenge is confirmed by applying Art. 7 UML, which defines the boundaries of the arbitration agreement. Party autonomy is an imperative instrument to shape the arbitral proceeding along with Art. 7 UML, which acts as a prerequisite condition to the parties' autonomy, together forming the pathway for the disputes that fall within arbitration. "The terms of the parties' arbitration agreement play a central role in defining the character of any arbitration, including the arbitral proceedings, and in producing a valid, enforceable arbitral award." [*Born*, 2015].
14. As per the amendments made to Art. 7 UML, whose substance is parallel to Art. 2 NYC, the word "in writing" that is found in Art. 2 NYC, is not restricted only to its literal meaning. In fact, "The 2006 amendments to the Model Law did three things: (1) modernized the definition of a "writing" to include electronic means of communication; (2) broadened the definition of when an "arbitration agreement" is "in writing" to include circumstances in which the parties' agreement as such is created not in writing, but orally or by performance in accordance with a written offer; (3) offered

enacting States an option of dispensing with the writing requirement entirely..."[*Holtzmann, et. al*, 1985]. Moreover, "Art. II of the Convention requires that there be an 'agreement in writing' under which the parties agree to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The term 'agreement in writing' includes an arbitral clause in a contract or an arbitration agreement, signed by the parties…" [*Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc. and Others*, 2001]. To conclude, all disputes arising out of the contract between CLAIMANT and RESPONDENT, challenge procedure included, is covered under the umbrella of the arbitration clause.

II. The PCA Cannot Act as Appointing Authority

15. The PCA shall not act as an appointing authority because it is an arbitral institution. Consequently, entrusting it with the power to decide the challenge would go against the parties' agreement [*R. Exh. C 2, p. 12, Clause 20: Dispute Resolution*]. Additionally, on the official website, the PCA defines itself as a "modern, multi-faceted arbitral institution" for that reason, discards it to act as an appointing authority since it violates the confidentiality provision consented by the parties [*R. Exh. C 2, p. 12, Clause 21: Confidentiality*].
16. Furthermore, the PCA shall not act as an appointing authority since its involvement was not agreed upon by the parties, not before the contract nor during the arbitral proceedings. In order for the PCA to act as an appointing authority it required that "All involved parties have agreed to settle the disputes under the PCA Arbitration Rules" [*Indlekofer*, 2013], which did not happen in the case at hand.

a) The Parties Intended to Exclude the Application of Art. 13(4) UAR

17. CLAIMANT did not object to RESPONDENT's arbitration clause, which implies the exclusion of arbitral institutions in case of dispute [*R. Exh. C 2, p. 12, Clause 20: Dispute Resolution*]. In fact, CLAIMANT's head of production manifested the full consent by stating "We can very well live with the clause as it is…in the unlikely event that a dispute arises… we are certain we will be able to overcome any problems without institutional support" [*R. Exh. C 3, p. 15, para, 4*].

18. This leads to the exclusion of Art. 13(4) UAR, as both parties consented to it. In a similar case, it has been ruled that "The parties to the arbitration agreement and the exclusion agreement

are the same. In the context of the umbrella nature of the Selection Agreement, there is not, in our opinion, a separate "arbitration agreement" and a separate "exclusion agreement." [*Angela Raguz v. Rebecca Sullivan,* 2001]. Art. 13(4) UAR states that the appointing authority shall decide on the challenge, and therefore applying such provision will breach the contract. "The party autonomy rule is based on the assumption that parties to an arbitration are knowledgeable and informed, and that they use the rule responsibly" [*Chatterjee,* 2003].

b) The Tribunal Shall Decide on the Challenge According to the UML

19. The Tribunal shall decide on the challenge pursuant to the *lex loci arbitri*. Contrary to CLAIMANT'S submission, the fact that the *Travaux Preparatoires* of the UML defend the position of allowing the challenged arbitrator to participate into the decision-making panel, does not stipulate a mandatory provision because this rule was not incorporated in the text of Art. 13 UML [*MfC, p. 16, para. 40*]. In this regard, it is important to highlight that the *Travaux Preparatoires* are merely general guidelines for interpretation and cannot be used to add rules to the UML, "...the note is prepared for information only and is not an official commentary on the Model Law..." [*Lewis,* 2016]. As a result, no matter what was stated during the *Travaux Preparatoires*, there are no doubts that Mr. Prasad shall not partake in the decision.

i) Art. 13(1) UML States that the Parties Must Agree on the Challenge Procedure

20. The parties did not agree on a challenge procedure. As stipulated by Art. 13(1) UML, "The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article". However, since the parties did not assent to any procedure regulating the challenge, the application of both Art. 13(1) and Art. 13(3) are unfitting and unsuitable.
21. Paragraph (1) of such provision states that choosing a procedure falls within the party autonomy, which is the utmost character in modeling the arbitral proceeding [*Redfern & Hunter,* 2009]. Such paragraph "recognizes the freedom of the parties to agree on a procedure for challenging an arbitrator" [*Holtzmann & Neuhaus,* 1989]. Furthermore, not choosing a challenge procedure inevitably eradicates the application of paragraph (3), which states that "If a challenge under any procedure agreed upon by the parties…is not successful…the court or other authority specified in article 6 to decide on the challenge…". Since no procedure was agreed upon, the application is automatically defeated.

ii) Failing Such Agreement, the Tribunal Has the Authority to Decide According to Art. 13(2) UML

22. Art. 13(2) UML explicitly grants the Tribunal the authority to decide on the challenge, where a challenge procedure was not agreed upon like in this case. "The (fourth) Working Group was agreed that, unless the challenged arbitrator withdrew from his office or the other party agreed to the challenge, the arbitral tribunal should decide on the challenge" [*Holtzmann & Neuhaus*, 1989]. Therefore, the Tribunal has the authority to decide as per the stipulation of Art. 13(2), "where an arbitrator or a tribunal of arbitrators is appointed and has been given the legal authority to act by the parties" [*Akinci*, 2011]. In the case at hand, such authority has been granted by the parties bilaterally in the arbitration agreement.

III. The *Contra Proferentem* Rule Is Not Applicable to the Case at Hand

23. Contrary to CLAIMANT'S allegations, the arbitration clause drafted and signed by the parties is not ambiguous or obscure [*MfC, p. 14, para. 27*]. Mr. Tsai declared on CLAIMANT'S behalf that "We can very well live with the clause as it is, since we are very confident that there will be no need to resort to arbitration" [*R. Exh. C 3, p. 15, para. 4*]. This clearly proves that CLAIMANT did not find the said clause unclear. Consequently, the *contra proferentem* rule is inapplicable, thus, by default, Art. 4.6 UPICC is also inapplicable, contrary to CLAIMANT'S views. Indeed, "An arbitral tribunal should construe the validity and scope of an arbitration clause in accordance with the general principles of the interpretation of contracts, i.e. seeking the real and common intent of parties, based on the wording of the clause, and the principle of confidence or good faith" [*Born*, 2014].
24. Moreover, the arbitration agreement selected by the parties [*R. Exh. C 2, p. 12, Clause 20: Dispute Resolution*] is very similar to the model clause contained in the annex of the UAR. It has been highlighted that similar clauses are also endorsed by other arbitral institutions inasmuch "The intent of leading model international arbitration clauses is to apply expansively to all disputes relating to a particular contract, regardless of legal formulation. That is consistent with the objective of commercial parties, which is to obtain a single, neutral and expert forum for efficiently resolving their disputes" [*Born*, 2014]. To recapitulate, the words 'any disputes' and 'out of or relating to' imply that the disputes occurring between the parties involve any disputes, not just some or selected matters, even if such a circumstance was not stated explicitly [*Born*, 2014]. Consequently, the

arbitration agreement did not contain any ambiguity or uncertainty, but was clearly understandable by both parties.

B. Mr. Prasad Shall Not Participate in the Decision According to the UML

25. The participation of Mr. Prasad in this arbitral proceeding is not deemed necessary, because a replacement arbitrator was already appointed by CLAIMANT and is available to participate instead of Mr. Prasad **(II)** [*R. PO1, p. 48, para. 1, line 5*]. Accordingly, Mr. Prasad's role is reckoned to be of little significance as his impartiality and independence is questionable and because the *lex loci arbitri* requires the majority of the Tribunal to take a decision on the challenge **(I)**.

I.Art. 29 UML Requires the Majority of the Tribunal to Decide

26. Art. 29 UML necessitates "All decisions to be made by the arbitral tribunal by a majority vote of its members" [*UML Digest*]. Thus, the arbitral proceeding shall continue with the remaining arbitrators or the newly constituted arbitral Tribunal, composed of Ms. Hertha Reitbauer [*R. p. 26, para. 23*], Prof. Caroline Rizzo [*R. p. 32*] and Ms. Ducasse [*R. PO1, p. 48, para. 1, line 5*].

II. The Replacement Arbitrator Appointed by Claimant Shall Partake in the Proceedings

27. CLAIMANT appointed a replacement arbitrator that shall take Mr. Prasad's place, if the challenge against him will be successful. "Both issues will be presented jointly at the oral hearing at which Ms. Ducasse is allowed to participate as a potential arbitrator" [*R. PO1, p. 48, para. 1, line 5*]. Ms. Ducasse, the replacement arbitrator, is required to take over the role of Mr. Prasad during the proceeding. Upon the appointment of a replacement arbitrator, it is automatically understood that the replacement arbitrator shall replace the challenged arbitrator. It is widely recognized that replacement arbitrators are appointed to partake in the proceedings [*Hulley Enterprises Ltd. v. Russian Federation*, 2014; *Veteran Petroleum Ltd. v. Russian Federation*, 2014; *Yukos Universal Ltd. v. Russian Federation*, 2014]. Thus, the replacement arbitrator appointed by CLAIMANT shall partake in the proceeding instead of Mr. Prasad. Opposite to CLAIMANT's views [*MfC, p. 16, para. 46*], it is wrong in law and facts to state that the President's vote will prevail in any case and, as a consequence, Mr. Prasad's vote is of no significance, "the presiding arbitrator may have no more than a voice equal to that of the co-arbitrators when it comes to making decisions" [*Kaplan & Mills*, 2007].

28. CLAIMANT might have argued that RESPONDENT's challenge is a delayed technique. However, due to the availability of a replacement arbitrator, no delay will occur in case the Tribunal found Mr. Prasad to be lacking of impartiality and independence.
29. To conclude, Mr. Prasad shall not participate in the decision, as the *lex arbitri* obliges the majority of the Tribunal to make the decision, meaning the replacement arbitrator and the remaining members of the Tribunal who pass the test of impartiality and independence.

CONCLUSION OF THE FIRST ISSUE

30. The challenge raised by RESPONDENT shall be decided by the Tribunal, because it falls within the scope of the arbitration agreement, as clearly stated, under the *lex loci arbitri*. However, the arbitral proceeding shall continue without Mr. Prasad's participation for all the reasons explained in the aforementioned argument.

ISSUE 2: MR. PRASAD SHALL BE REMOVED FROM THE TRIBUNAL BECAUSE HE LACKS IMPARTIALITY AND INDEPENDENCE

31. There are solemn justifiable uncertainties against Mr. Prasad's ability to fairly and justly decide on the case at hand. First of all, contrary to CLAIMANT'S allegations, the challenge was timely submitted by RESPONDENT **(A)**. Time is money and, since RESPONDENT has already suffered monetary losses, it is well aware of the importance of saving time Secondly, Mr. Prasad is evidently in lack of impartiality and independence under the applicable procedural law **(B)**, not because of the ideas expressed in his publication **(C)**, but due to his relationship with the third-party that is funding CLAIMANT in the current proceeding **(D).** Overall, Mr. Prasad's behavior violates the basic ethical standards which any arbitrator should respect **(E)**.

A. Respondent's Submitted the Challenge Within the Time Frame Determined by the Procedural Law

32. Contrary to CLAIMANT's allegations [*MfC, p. 22, para. 68*], RESPONDENT submitted the challenge within the time limit specified under Art. 13(1) UAR **(I)**. RESPONDENT had confirmation of the involvement of a third-party funder on 30 August 2017, after the telephone conference with the Tribunal and CLAIMANT [*R. p. 43, para. 2*], and requested the latter "to provide us with the name of the funder as well as the relevant documentation to facilitate discussion" [*R. p. 33, para. 3*].

CLAIMANT declared the identity of the third-party funder only on 7 September 2017 [*R. p. 35, para. 1*], which is the *dies a quo* for counting the days established under the law to submit the challenge. In fact, since the Notice of Challenge was submitted on 14 September 2017, the submission happened within the time frame of 15 days, since it was communicated to all the parties after the lapse of only 7 days only, i.e. before the expiration of the prescription period.

I. Art. 13(1) UAR Establishes 15 Days Time Limit for Raising the Challenge and Respondent Complied with It

33. Art. 13(1) UAR identifies two different starting periods for the countdown of the days available to a party to raise a challenge, the first being that the notice has been submitted within 15 days "after (a party) has been notified of the appointment of the challenged arbitrator" or "within 15 days after the circumstances mentioned in articles 11 and 12", that is the discovery of justifiable doubts on the impartiality or independence of an arbitrator. Thus, the use of the preposition 'or' gives the parties involved the freedom to raise a challenge when such circumstances have occurred. Specifically, "The second (part) applies where the challenging party becomes aware of circumstances relevant to a challenge, either as a result of its own enquiries or as a result of a disclosure by the challenged arbitrator under Article 11…" [*Croft et. al,* 2013].
34. Consequently, despite the selective analysis provided by CLAIMANT regarding the grounds for the challenge [*MfC, p. 21, para. 69*], which will be further rebutted in the following parts of the argument. The discovery of the third-party funder and the subsequent Notice of Challenge after 7 days from the day when such circumstance was revealed, makes the challenge timely submitted, thus giving the Tribunal the power to decide. Moreover, assuming but not considering that the challenge is belated, the Tribunal shall still decide the challenge on the doubts relating to impartiality and independence of Mr. Prasad to guarantee the principle of due process this is further confirmed by Art. V(1)(b) NYC. "Some national courts (i.e USA), in both common law and civil law jurisdictions, have also looked, expressly or impliedly, to local standards of procedural fairness in the enforcement forum in applying Article V(1)(b)" [*Kanoria v. Guinness,* 2006; *Irvani v. Irvani,* 2001*; Minmetals Germany GmbH v. Ferco Steel Ltd,* 1999*; Sulzer v. Somagec,* 1989]. Thus, the challenge shall not be dismissed on such allegations.

B. Mr. Prasad Lacks Impartiality and Independence under UAR, UML and IBA Guidelines

35. Mr. Prasad was challenged as there are serious impediments to his decision-making abilities due to his strict connections with CLAIMANT's third-party funder [*R. p. 38*]. Thus, the challenge raised by RESPONDENT is based on justifiable doubts, that could not be ignored, whether looking at the issue from the UAR or the UML perspective **(I)**, or by the lens of the IBA Guidelines **(II)**.

I. The Challenge Is Based on Serious and Justifiable Doubts

36. The UAR and the UML provide for specific and precise hypotheses when a challenge can be raised, which are enucleated in just two words: 'justifiable doubts'. Under the *lex arbitri*, the reasonable person test is taken into account to consider if the challenge is based on justifiable circumstances. "The circumstances that give rise to justifiable doubts as to the arbitrator's impartiality and independence are to be appreciated in the eyes of an objective, reasonable man, as in the UNCITRAL Rules" [*Habegger et al.* 2005]. Any individual in RESPONDENT's place would have behaved as RESPONDENT did based on the repeated appointment of Mr. Prasad by CLAIMANT [*R. PO2, p. 51, Cl. 9*], the strong tie between Mr. Prasad and the third-party funder, and the non-disclosure of the third-party funding [*R. p. 36, para. 1*].

37. An arbitrator's lack of impartiality and independence is amounted to a great deal of issue in arbitration, leading to the possibility of the rendered award to be of not enforced. In a leading case, "The arbitral award was set aside because the chair of the arbitral tribunal was considered to have lacked impartiality. The situation producing the lack of impartiality was that during the arbitration he had had an 'of counsel' arrangement with a law firm where, in effect, one of the parties in the arbitration was and had been a major client for a number of years." [*Andres Jilkén v. Ericsson AB*, 2011]. Thus, Mr. Prasad's participation in the proceeding would raise more issues than those which is likely to resolve.

a) Mr. Prasad Did Not Disclose all the Circumstances Which Might Affect His Decision-Making Capacity Pursuant to Art. 11 UAR

38. CLAIMANT is arguing that Mr. Prasad is impartial and independent on the basis of his declaration of independence in compliance with Art. 11 UAR [*R. Exh. C 11, p. 23*], which states that an arbitrator, "Shall without delay disclose any such circumstances to the parties and other arbitrators…". The article stipulates that there will be no delay in such disclosure, but Mr. Prasad did not abide by it.

In his declaration of 26 June 2017, Mr. Prasad stated "I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration." [*R. Exh. C 11, p. 23, para. 4*] Then, on 29 August 2017, RESPONDENT obtained reliable information that CLAIMANT was sponsored by a third-party funder, thus demanding a full disclosure [*R. p. 33*]. Only on 7 September 2017 CLAIMANT decided to disclose the existence and identity of its funders [*R. p. 35, para. 1*], but only on 11 September 2017, after 4 days, Mr. Prasad revealed the previous relationships with the third-party funder [*R. p. 36, para. 2*]. CLAIMANT nor Mr. Prasad did not even mention the strong correlation between Mr. Prasad and FindFunds, "Prasad whom I know from two previous arbitrations…" [*R. p. 38, para. 3*], this implicating that Mr. Prasad was aware of the aforementioned circumstances, but only declared them after months from his appointment and upon RESPONDENT's request and the Tribunals order.

b) Mr. Prasad is Challenged Due to His Lack of Impartiality and Independence According to Both Art. 12 UAR and Art. 12 UML

39. Art. 12 UAR and Art. 12 UML state that an arbitrator can be challenged if there are justifiable doubts as to his impartiality or independence, which is what the challenge raised by RESPONDENT to Mr. Prasad is grounded upon. In addition, Art. 12 UAR specifies that a challenge may occur only after the arbitrator was appointed, which is the circumstance in our case, since RESPONDENT was not aware of the facts which affect Mr. Prasad's impartiality and independence, except after months from his appointment.
40. Art. 12 UML imposes "on each arbitrator a continuing duty to disclose to the parties circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence" [*UML Digest*]. This principle is confirmed by a case where the minister of Quebec was part to a contract containing a clause with the appointment of the same minister as an arbitrator, in evident conflict with a fair proceeding. In the case "…the court held that a clause providing that disputes relating to a contract will be arbitrated by a party to that contract is inconsistent with the requirements of impartiality and independence, and is therefore null as contrary to public policy" [*Desbois v. Industries A.C. Davie Inc.*, 1990].
41. Therefore, Mr. Prasad shall be removed from the Tribunal, because of the serious impediments which affect his ability to act as an impartial and independent arbitrator.

II. Mr. Prasad's Lack of Impartiality and Independence is Confirmed Pursuant to the IBA Guidelines

42. CLAIMANT tried to defend Mr. Prasad's participation under the IBA Guidelines, but then concluded that such Guidelines do not apply to the case at hand [*MfC, p. 23, para. 88*]. However, it has to be noted not only that the IBA Guidelines are applicable, but also that Mr. Prasad's appointment by Mr. Fasttrack twice in the previous two years and his connection with CLAIMANT's third-party funder constitute a series of conflicts of interest. Consequently, pursuant to the IBA Guidelines, Mr. Prasad shall not serve as arbitrator in the current proceeding, as the award may be biased and rendered in favor of CLAIMANT *[R. PO2, p. 51, Cl. 15*] due to the reasons discussed below.

a) The IBA Guidelines Are Applicable to the Case at Hand

43. Despite CLAIMANT disregarding the IBA [*MfC, p. 19, para. 57*], Tribunals and parties usually refer to the guidelines to help keep a consistent proceeding. Therefore, they shall apply to the case at hand. The IBA Guidelines are a set of principles and lists which are general international practices. RESPONDENT had referred to the IBA Guidelines because of its applicability upon the information disclosed by CLAIMANT and Mr. Prasad. "These guidelines and rules seek to codify best, or at least internationally accepted, practice and to offer parties the chance to introduce a degree of consistency and predictability to the arbitral process" [*Hodges*, 2017].

i) The Existing Circumstances Fall Within the Non-Waivable Red List

44. Mr. Prasad's and his firm receive a significant amount of income from the proceedings with Findfunds LP and its subsidiaries [*R. PO2, p. 50, Cl. 6*]. Art. 1.3 IBA Non-Waivable Red List states that if an arbitrator has a significant financial or personal interest in one of the parties or the outcome of the case, this circumstance cannot be waived, a point that CLAIMANT purposely avoided. "The Non-Waivable Red List is an enumeration of situations, which give rise to justifiable doubts as to the arbitrator's impartiality and independence" [*Obe*, 2012]. Provided that Mr. Prasad's firm is representing a client in a proceeding funded by Findfunds LP, and CLAIMANT is also being funded by a subsidiary of Findfunds LP [*R. p. 36*], there are serious matters qualifiable as justifiable doubts. Mr. Prasad was an arbitrator in 21 arbitrations over the last three years, five of which have been funded by Findfunds LP [*R. PO2, p. 51, Cl. 10*]. This leads us to the conclusion that the income received from the entity has an impact on the decision of this case.

ii) The Commercial Relationship Between Mr. Prasad and Funding 12 Ltd is Non-Permissible Under IBA Waivable Red List

45. Mr. Prasad's connections with Funding 12 Ltd [*R. p. 36*], whose main shareholder is FindFunds LP, are non-permissible under the IBA Waivable Red List. Such List is composed of situations where there is an explicit agreement by the parties to the circumstances disclosed by the arbitrator. "The Guidelines provide that items on the Waivable Red List can only be waived by an express agreement, not by silence or acquiescence (such as failure to object to a disclosure within 30 days or some other time period)" [*Born*, 2014]. "The courts have held that (in the IBA Red List), if an arbitrator has substantial, undisclosed business dealings or a close personal relationship with a party, bias can be found, thereby affecting the independence of impartiality of the arbitrator" [*Obe*, 2012]. Accordingly, the relationship between Mr. Prasad and Funding 12 Ltd affects his impartiality and independence because it implies favouritism to CLAIMANT, due to the reason that "Funding 12 Ltd gets 25% of all amounts awarded in the arbitration" [*R. PO2, p. 50, Cl. 1*]. To rebutting CLAIMANT's allegations on such point [*MfC, p. 20, para. 62*], it is sufficient to point out that RESPONDENT did not agree to Mr. Prasad appointment upon awareness of the connections with CLAIMANT's funder.

iii) The Repeated Appointments of Mr. Prasad by Mr. Fasttrack Raise a Conflict of Interest According to IBA Orange List

46. Mr. Prasad disclosed that he had been appointed twice by Mr. Fasttrack's firm [*R. p. 36*], which proves that there are grounds for disqualification under Art. 3.3.8 IBA Orange List, which establishes that repeated appointments might be an implication for disqualifying arbitrators. "The quantitative approach has led to disqualification of arbitrators in numerous instances and across various jurisdictions" [*Koh*, 2017]. Several awards have been annulled due to circumstances laid down in the Orange List [*Société Somoclest v. Société D.V. Construction*, 2010; *Kalinka-Stockmann v. ZAO AKB*, 2008; *Neaman v. Kaiser Foundation Hospital*, 1992]. Hence, despite CLAIMANT's allegations [*MfC, p. 20, para. 64*], Mr. Prasad's disclosure reveals that there are serious grounds for challenge.

C. Mr. Prasad's Publication and the Retrieved Metadata Are Grounds for the Challenge

47. CLAIMANT's appointment of Mr. Prasad was based largely on the opinions expressed in his publication about the non-conformity of goods under the CISG, which is leaning towards CLAIMANT **(I)**. Moreover, the metadata retrieved by RESPONDENT in CLAIMANT's Notice of Arbitration are clear indication of the personal and established link between Mr. Prasad and CLAIMANT **(II)**.

I. Claimant Appointed Mr. Prasad because of the Views Expressed in His Publication

48. CLAIMANT's intention when appointing Mr. Prasad was solely based on a publication dealing with the non-conformity of goods under the CISG [*R. Exh. R 4, p. 40*]. Based on the metadata retrieved by RESPONDENT, Mr. Fasttrack wrote that "Prasad, whom I know from two previous arbitrations, is the perfect arbitrator for our case given his view expressed in an article on the irrelevance of CSR on the question of the conformity of goods" [*R. p. 38, para. 3*]. Therefore, RESPONDENT does not contest the freedom to express public opinion, rather deems such opinion to be ground for challenge.

II. The Metadata Prove the Strong Link between Claimant and Mr. Prasad

49. The metadata is a solid proof of an old, personal and formal relationship between CLAIMANT and Mr. Prasad [*R. p. 38*]. If such information was disclosed at the time of Mr. Prasad's appointment, the challenge would have been avoided or raised at that time, but the fact that CLAIMANT tried to hide purposely such valuable and altering information, suggests that the connection between the two is way stronger than what CLAIMANT is allegedly portraying [*R. p. 38, para. 3*]. Consequently, Mr. Prasad was appointed on the basis of his personal views regarding the conformity of goods, which might benefit CLAIMANT which creates vital grounds for the challenge raised.

D. There Is No Doubt that Mr. Prasad Was Aware of Claimant's Third-Party Funding

50. On another note, it is certain that Mr. Prasad was well aware of the plot regarding third-party funding. Not only CLAIMANT resorted to an external financial support, which is a fact biased in nature **(II)** but, by doing so, it has breached the confidentiality deal between the parties **(I)**.

I. By Involving a Third-Party in the Proceeding, Claimant Breached the Confidentiality Agreement Between the Parties

51. In RESPONDENT's General Conditions, the parties clearly agreed on a confidentiality clause binding for both parties [*R. Exh. C 2, p. 12, Clause 21: Confidentiality*]. RESPONDENT stressed on the importance of preserving confidentiality by stating that "You are required to hold all information pertaining to this tender confidential and to limit the dissemination of information…". It is evident that one of the main clause in any contract [*Smeureanu*, 2011] was breached when CLAIMANT gave away confidential information to the third-party funding.

II. Claimant Is Funded in this Arbitration by Funding 12 Ltd

52. CLAIMANT forcibly disclosed that it is being funded by Funding 12 Ltd, whose main shareholder is FindFunds LP [*R. p. 35*]. This would not have created an issue if not for the fact that "Findfunds LP owns 60% of the shares in Funding 12 Ltd". Even if CLAIMANT wanted to argue that the economic interest is not a prominent ground of bias, FindFunds' subsidiaries funded "33 arbitration cases, 6 of which are still ongoing" [*R. PO2, p. 50, Cl. 2*].
53. As a result, the relationship found between the third-party funder and Mr. Prasad are of vital nature, as they could alter the pathway of the arbitral proceedings and, eventually, cause side-effects to the award.

a) Findfunds LP, Main Shareholder of Funding 12 Ltd Is Represented by Mr. Prasad's Slowfood Partner

54. Another evident indication of Mr. Prasad's conflict of interest is the fact that Mr. Prasad's law firm has merged with Slowfood, and one of the former Slowfood's partners has been previously funded by FindFunds LP [*R. p. 36, para. 3*]. Such conflict of interest implies that Mr. Prasad cannot act as an objective arbitrator in the case at hand. Even though CLAIMANT argued that this is not a ground for the disqualification of Mr. Prasad [*MfC, p. 26, para 106*], or wanted to argue that Mr. Prasad allegedly was not aware of such third-party funder, this is not an exemption of the justifiable doubts raised against him, especially when financial benefits are involved [*Rogers*, 2014].
55. It is crystal clear as to why Mr. Prasad's participation in the decision would give rise to a conflict of interest when considering that "the party appointing Mr. Prasad had been funded by a subsidiary of FindFunds LP have been within the 5 biggest of these arbitrations, making up for 20% of the

arbitrator fees generated during the last three years...Mr. Prasad derives between 30% - 40% of his earnings from his work as an arbitrator" [*R. PO2, p. 51, Cl. 10*]. "The relationships between funders and law firms often go much deeper. It may be for example that the client entered into the funding arrangement as a result of the law firm's introduction or relationship. It may even be that the law firm relies upon the funder for financing across a portfolio of matters, which can make it more difficult to avoid conflicts of interest" [*Task Force,* 2017]. By applying these principles to the case at hand, little doubt is left regarding Mr. Prasad's ability to take a fair and just position in the decision.

E. Additionally, Mr. Prasad Should Be Removed Because He Breached Standards of Ethical Conduct for Arbitrators

56. Although not raised by this CLAIMANT, it is important to highlight that Mr. Prasad breached fundamental standards contained in several codes of conducts of arbitrators, as provided and recommended by many arbitral institutions. One of the most well-known and recognized ethical code of conduct is the one issued by the American Bar Association. Cannon II ABA deals with the fact that an arbitrator should disclose all and any relationships or circumstances that would likely obstruct impartiality and independence. For avoidance of such matter, arbitrators who are requested to participate in the proceeding, should before accepting the appointment disclose "Any known direct or indirect financial or personal interest…Any known existing or past financial, business relationships…The nature and extent of any prior knowledge they may have of the dispute". As established by now, Mr. Prasad did not follow the disclosure procedure as an impartial and independent arbitrator should have done, placing him in an ambiguous situation. The ABA code also provides that an arbitrator should disclose any relationships involving "current employers, partners, or professional or business associates…"
57. As aforementioned, Mr. Prasad did not comply with such ethical conduct by hiding relevant information he should have disclosed immediately after his appointment, "In order to avoid any risk of being declared in violation of the obligation of impartiality and independence, a prospective arbitrator should disclose all of the facts that could reasonably be considered to be grounds for disqualification" [*Redfern et al*. 2015]. Accordingly, any standard code of ethics adopted worldwide will clearly support RESPONDENT'S doubts regarding the impartiality and independence of the challenged arbitrator.

CONCLUSION OF THE SECOND ISSUE

58. In the light of the above, it is not only established but certainly proved at this stage that Mr. Prasad shall be removed from the Tribunal, because there are clear indications as to his lack of impartiality and independence. Whether the issue is looked at from his publication, the metadata, or the third-party funding point of view, Mr. Prasad is not the right arbitrator to decide on the case.

ARGUMENT ON THE MERITS

ISSUE 3: RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT ON THEIR OWN

59. RESPONDENT's SC govern the contract as CLAIMANT accepted RESPONDENT's tender, which was an offer in accordance to Art. 14(1) CISG and Art. 2.1.2 UPICC, inasmuch it was definite and showed RESPONDENT's clear intention to be bound **(A)**. Moreover, pursuant to Art. 8 CISG, the parties intended to apply RESPONDENT's SC as confirmed by the shared negotiations between them **(B)**.

A. Respondent's Tender Was an Offer Accepted by Claimant Under the Applicable Substantive Law

60. Through the application of both Art. 14(1) CISG and Art. 2.1.2 UPICC, the substantive laws that govern the contract, it is evident that RESPONDENT's tender is an offer **(I)**. Thus, CLAIMANT's reply is an acceptance under Art. 18(1) CISG and Art. 19(2) CISG **(II)**. In any case, CLAIMANT's GC are not applicable **(III)**.

I. Art. 14(1) CISG and Art. 2.1.2 UNIDROIT Principles Require the Offer to Be Definite and to Contain a Clear Intention to Be Bound

61. RESPONDENT communicated the importance of CLAIMANT abiding to the Tender Documents, as it presented all the elements of an offer [*R. Exh. C 1, p. 8, para. 3*]. Art. 14(1) CISG states that, in order to form a legally binding contract, the offer must contain definite and certain terms that a reasonable person can understand, by having a clear intention to be bound [*Kröll et al.* 2011; *Lookofsky*, 2000; *Honnold*, 1999]. Art. 2.1.2 UPICC reiterates the above-mentioned principle, by clarifying "To this effect the parties often include a contract provision expressly indicating the documents which form part of their contract and their respective weight", as RESPONDENT did in

this case [*R. Exh. C 2, p. 11, Clause 5*]. Despite CLAIMANT's allegations [*MfC, p. 29 para. 124*], RESPONDENT fixed a price per chocolate cake, not exceeding 2.50 USD [*R. Exh. C 2, p. 10, Clause 3*; *Farnsworth 1,* 1984]; thus, a "paramount element" of the contract was dictated by RESPONDENT, with modifications made by CLAIMANT. As a consequence, RESPONDENT's Tender Documents constitute an offer.

a) Respondent's Tender Offer Met Such Requirements

62. RESPONDENT's invitation to tender is an offer because it fulfilled the requirements set forth under the CISG and the UPICC. As CLAIMANT's counsel admitted, RESPONDENT's Tender Documents are sufficient enough to be incorporated in CLAIMANT's so-called "offer" [*MfC, p. 29, para. 126*]. This means that CLAIMANT was aware that RESPONDENT's documents served the definite and certain terms required, in this way defeating CLAIMANT's argument. In fact, RESPONDENT's offer included the specification of the goods, the quantity of the goods, the terms of delivery, the purchase price and payment conditions [*R. Exh. C 2, p. 10*; *Helen Kaminksi Pty. Ltd. v. Marketing Australian Prods,* 1997], which rebut a possible counter-argument regarding the materiality of changes proposed by CLAIMANT in its reply and according to Art. 19(3) CISG [*Schwenzer 3,* 2016]. Moreover, RESPONDENT clearly showed that it was willing to execute the tender in case an acceptance would occur [*Schlechtriem,* 1986], which, in the light of what happened between the parties in 2014, 2015 and 2016 [*R. p. 25, para. 13*], simply confirms that RESPONDENT's tender was an offer and CLAIMANT accepted it with minor modifications. This is sufficient to prove that RESPONDENT's tender met the requirements set forth under the CISG.

II. Claimant's Tender Does Not Constitute an Offer, but Is an Acceptance with Modifications According to Art. 18(1) and Art. 19(2) CISG

63. RESPONDENT accepted CLAIMANT's modifications to the offer [*R. Exh. C 5, p. 17*], which were merely sent via email [*R. PO2, p. 52, Cl. 27*], without the solemnity that usually governs the bargaining between dealers. Consequently, CLAIMANT cannot argue that the modifications made constitute an offer or a counter-offer [*MfC, p. 29, para. 125*]. Even so, under Art. 19(2) CISG such modifications were incorporated by RESPONDENT in its original terms of the contract and do not stand alone. It has been highlighted that "Alterations that deal with questions not addressed in the offer and that adopt solutions contrary to those of the applicable law should be considered as material alterations" [*Kröll*

et al. 2011]. However, such principle does not suit the case at hand, because the amendments made by CLAIMANT were matters already regulated in the contract, and CLAIMANT could not achieve those specific results with a new offer [*R. Exh. C 3, p. 15*; *Special Screws case,* 1994; *Frozen Bacon case*, 1992]. Other scholars have pointed out that "Changes to the terms of an offer made by an acceptance must affect the content of the offer as interpreted under Article 8. If the parties agree in substance, then discrepancies in the wording...are not different terms within the meaning of Article 19" [*Schwenzer 3*, 2016]. This opinion, generally agreeable, is however not applicable to the case at hand, because the proposed modified terms were simply additions to the substance of the agreement which was already reached by the parties.

64. In the absence of other evidences indicating assent to an offer, Art. 18(1) CISG states that silence or inactivity shall not amount to acceptance and therefore CLAIMANT's allegations regarding RESPONDENT's silence are groundless [*MfC, p. 30, para. 134*; *CISG Digest*]. This brings us to the conclusion that CLAIMANT's documents cannot constitute an offer; thus, RESPONDENT's SC apply including CLAIMANT's modifications [*MfC, p. 29, para 127*].

III. Claimant's General Conditions of Contract Are by No Means Applicable

65. Opposing what was argued by CLAIMANT, the offer is not subject to CLAIMANT's SC because, as shown in the record, "In case CLAIMANT wants to make its offer subject to specific conditions which deviate from its GC these are included in the part of the offer form headed "Specific Terms and Conditions"" [*R. Exh. C 4, p. 16, Specific Terms and Conditions; R. PO2, p. 53, Cl. 28*]. CLAIMANT's GC are not applicable because they only referenced aspects of an already concluded deal, i.e. modifications in the type of the chocolate cakes and the payment terms, which were already set by RESPONDENT. This is further confirmed by a judgment in a case where a contract contained a reference to its standard condition, which had an exemplary liability for defects in used machinery. The court ruled that the excluded liability clause was invalid because the buyer was not made aware of such clause [*Machinery case,* 2001]. Additionally, "The reference to the incorporation of standard terms should not be hidden away or printed in such a manner that it is easy to overlook" [*CISG AC No. 13*]. Contrary to CLAIMANT's argument regarding RESPONDENT's acceptance of CLAIMANT's GC [*MfC, p. 29, para. 125; R. Exh. C 5, p. 17*], by applying the aforementioned principles it is unquestionable that the mere reference to a web link contained in CLAIMANT's reply is not sufficient to prove that RESPONDENT had knowledge of such conditions and accepted them.

B. The Parties Intended to Apply Respondent's Standard Conditions Under CISG

66. The parties' intention regarding which SC apply is clear under the scrutiny of Art. 8 CISG, in accordance to which RESPONDENT's SC are the governing pamphlet for the contractual relationship in the case at hand **(I).** Therefore, CLAIMANT's assertion of applying the battle of forms shall be disregarded, as it does not fall under the scope of CISG **(II)**.

I. The Parties' Intention Shall Be Interpreted in Accordance with Art. 8 CISG

67. The parties intended to apply RESPONDENT's SC, as it is proved by the correspondences between them [*R. Exh. C 6, p. 18, para. 3*]. CLAIMANT argued that, according to Art. 8(1) CISG, RESPONDENT was aware of CLAIMANT's intention to overcome RESPONDENT's SC with its own GC [*MfC, p. 30, para. 132*]. However, CLAIMANT made no further modifications to the paramount elements of the contract, apart from the type of chocolate cakes and the payment terms, but simply suggested minor amendments to the terms fixed by RESPONDENT. Thus, the proper interpretation of such provision supports the argument that both parties were well aware of the SC applicable to their deal.
68. If Art. 8(1) CISG does not shed enough light on the issue, Art. 8(2) CISG will apply, along with the "reasonable understanding" test prescribed for the interpretation of the parties' intention. Opposing CLAIMANT's counsel allegations [*MfC, p. 30, para. 134*], anyone in the same situation would understand that RESPONDENT's SC apply because CLAIMANT did not object to them. "The offeree may be able to invoke the rule of paragraph (2) by showing that, when the offeree accepted the offer, a reasonable person of the same kind and in the same circumstances as the offeror would have had the same understanding as the offeree" [*Inta v. Officina Meccanica,* 1993; *Clothing Manufacturer case*, 1990; *Farnsworth 2*, 1987].
69. In case the Tribunal would not be persuaded through the application of the previous provisions, Art. 8(3) CISG must be employed to detect the intention of the parties. Such article refers to all the correspondences exchanged and conducts performed between the parties as parameters for interpretation. "Article 8(3) expressly states consideration is to be given to all relevant circumstances" [*Schwenzer 3*, 2016; *CISG Digest; Huber & Mullis,* 2007]. In the span of three years, CLAIMANT just performed the contract in full compliance with RESPONDENT's SC until the unfortunate day when the breached was discovered.
70. In conclusion, CLAIMANT's acceptance of RESPONDENT's offer, without objection to the SC, is sufficient enough to understand that there is no alternative for the Tribunal but to consider

RESPONDENT's SC as the cornerstone of the contractual relationship. Under Art. 8 CISG, RESPONDENT's intention was to apply its own SC, including CLAIMANT's minor modifications, but not CLAIMANT's SC, since the reference of the GC was an impractical link [*MfC, p.30 para. 131-133*], and CLAIMANT had the same understanding.

II. The Battle of Forms Rule Is Not Applicable to the Case at Hand

71. The battle of forms is defined as "The 'ping-pong' of mutually sending again and again the own standard conditions often with the declaration that any contract is exclusively governed by these conditions and that no other conditions are accepted is still commercial practice and particularly so in international sales transactions" [*Magnus,* 2007]. Opposing the submission made by CLAIMANT's counsel [*MfC, p. 31- 32, para. 136-141*], the battle of the forms does not apply to the case at hand under the CISG. "There is no consensus among scholars whether the issue of battle of forms falls under the CISG… Usually Art. 19 CISG is applied, however, it deals with non-confirming acceptances in general and is not designed to give solutions when contracts are concluded using standard terms" [*Fejös,* 2007; *Hellner,* 1986].
72. Art. 19(1) CISG clearly states that any deviation from the content of the offer makes an acceptance a rejection and a counter-offer. "The underlying idea of this doctrine being that the offeror shall not be forced to accept something he did neither intent nor consent to" [*Magnus,* 2007]. CLAIMANT did not object to the terms that RESPONDENT fixed, but suggested minor modifications about the type of the chocolate cakes and the payment terms.
73. On the other hand, Art. 19(2) CISG establishes that if the deviation is not material, the acceptance concludes the contract nonetheless to its terms unless the offeror objects to it without undue delay. "In the case of immaterial modifications, it is acceptable that the offeror must communicate its dissent rather promptly. Otherwise its consent is irrefutably presumed" [*Magnus*, 2007]. Under Art. 19(2) CISG, the mirror image rule is the only applicable to the case at hand. "An exception is established for the possible introduction of new terms into the acceptance that do not substantially alter the offer...in this case the acceptance will be valid; the contract will consist of both the terms of the offer and those included in the acceptance that do not substantially alter the offer, so long as the offeror without delay does not object to the new terms" [*Guide to CISG*]. As a consequence, the battle of forms in inapplicable, rather the mirror image rule is the prevailing doctrine.

a) Accordingly, the Last-Shot Rule Is Defeated and Claimant's General Conditions Do Not Apply

74. Since the battle of forms is not applicable to the case at hand, CLAIMANT cannot argue for the applicability of the last-shot rule [*MfC, p. 32, para. 143*]. The last-shot rule is defined as the form that is fired last, constituting the basis of the contract and only when the proposal is accepted then it is binding upon the parties [*Wildner*, 2008; *Stemp*, 2005; *Schlechtriem*, 1986]. The battle of forms does not fall under Art. 19 CISG, hence the last-shot rule is deemed to be inapplicable alike. This further proves that RESPONDENT's GC apply [*MfC, p. 32, para. 142-146*].

b) The Knock-Out Rule, Incorporated in Art. 2.1.22 UNIDROIT Principles, Is Irrelevant

75. The knock-out rule is based on the contract formation and the terms used by the parties. The result of such rule is that the proposal will be comprised of terms on which CLAIMANT and RESPONDENT agreed to, along with gap-fillers from the CISG and UPICC. CLAIMANT argues that, since the standard terms of both the parties are different, they must be excluded or 'knocked out' [*MfC, p. 32, para. 147*]. However, the knock-out rule does not apply in this case, because, as stated in the record, "in a publicised tender the terms of the contract are always determined by the party initiating the tender" [*R. p. 27, para. 25*]. Generally, this solution is applied "when the parties intended a contract to be concluded in spite of the conflicting terms and did not raise the issue" [*Chateau Des Charmes Wines Ltd v. Sabate*, 2005], but not in the cases when the kick off of the negotiation process is a tender offer. In order for the knock-out rule to be applied, there must be terms that "knock each other out", which is not the case here. Indeed, the only conflicting contractual terms between the CLAIMANT's contractual version and the RESPONDENT's one are only those on the type of chocolate cakes and the payment terms and nothing more, since the parties share common values and similar production standards due to their membership in GLC.

76. To conclude, RESPONDENT's SC governs the contract as both parties' intent signifies their application pursuant to Art. 8 CISG. Moreover, the battle of forms is not applicable to the case at hand, along with the last shot rule and the knock-out rule, since there are no conflicting terms regarding the applicability of RESPONDENT's documents [*MfC, p. 32, para. 147*].

CONCLUSION OF THE THIRD ISSUE

77. RESPONDENT's SC shall govern the contract because they were part of RESPONDENT's tender documents, which constitute an offer accepted by CLAIMANT under the applicable substantive law. Furthermore, since it was proved in the arguments above that the common intention of the parties was to apply RESPONDENT's SC, no space is left for battle of forms, last-shot rule and knock-out rule which are mere doctrines and are not binding under the text of the law.

ISSUE 4: CLAIMANT DELIVERED NON-CONFORMING CHOCOLATE CAKES UNDER RESPONDENT'S GENERAL CONDITIONS OF CONTRACT

78. RESPONDENT bargained with CLAIMANT to deliver chocolate cakes, conforming to environmental and sustainable standards. However, CLAIMANT breached its obligation of results when delivering non-conforming goods **(A)**. Indeed, the cakes were not adhering to GLC Principles **(B)**, whose importance RESPONDENT had stressed upon negotiating the agreement. As a consequence, CLAIMANT cannot be exempted from liability, arguing that the breach is due to its supplier's misconduct **(C)**.

A. Claimant Breached Its Obligation of Results Under Both CISG and UNIDROIT Principles

79. In RESPONDENT's Tender Documents [*R. Exh. C 2, p. 10*], the source of the ingredients was required to be in accordance with RESPONDENT's Special Conditions of Contract, which entail that the suppliers must adhere to the environmental standards established by GLC and to conduct their business ethically [*R. Exh. C 2, p. 12, Section V*]. Therefore, contrary to CLAIMANT's submission [*MfC, p. 34, para. 153*], RESPONDENT proved the nature of the obligation, which is of results under Art. 8 and Art. 35 CISG and Art. 4 UPICC **(I)**, circumstance confirmed by Art. 5.1.5 UPICC **(II)**.

I. Contrary to Claimant's Allegations, Respondent Proved the Nature of the Obligation

80. In its reply to RESPONDENT's tender, CLAIMANT made only modifications to the type of cakes and the payment terms [*R. Exh. C 4, p. 16*], agreeing to all the other clauses pertained in RESPONDENT's offer. CLAIMANT also stated that it would tender in accordance to the specifications set forth by RESPONDENT [*R. Exh. R 1, p. 28*]. Therefore, CLAIMANT was fully aware of the clauses requiring environmental friendly production. Accordingly, when RESPONDENT included in its clauses the wording "environmentally sustainable" chocolate cakes, CLAIMANT should have understood that it

was under the obligation of achieving a specific result, i.e. the delivery of cakes adhering to said clauses. Since the nature of the obligation was explicitly determined in RESPONDENT's Tender Documents in accordance to the requirements set forth in Art. 5.1.4 UPICC, and CLAIMANT was aware of it, the latter cannot argue that its obligation was of best efforts [*MfC, p. 34, para. 153*].

81. In a similar case, when a buyer prescribed its goods to conform to standard 25G2S and received goods which were of A400S standard, the tribunal ruled that the quality of the goods was inconsistent with the contractual stipulations [*Rebar Coil case,* 1997; *Zamir,* 1991]. In the dispute at hand, it was proposed by RESPONDENT, and accepted by CLAIMANT, that the cakes would conform to environmentally sustainable standards that adhere to GLC [*Adex v. First International Computer,* 2007; *Macromex Srl. v. Globex International Inc.*, 2007].

a) The Parties Agreed on an Obligation of Results Under Art. 8 CISG and Art. 4 UNIDROIT Principles

82. RESPONDENT decided to tender with CLAIMANT due to CLAIMANT's adherence to the GLC Principles, and its changes to the "production processes, internal organization, and the relationship with its suppliers and customers after it had become a Global Compact member" [*R. Exh. R 5, p. 41, para. 3*]. It was clearly stipulated that the aforementioned standards were of severe importance for RESPONDENT as it was trying to become a Global LEAD Compact member [*R. PO2, p. 54, Cl. 38*]. Consequently, by applying the CISG and the UPICC, it is evident that the parties' intention was to fulfill an obligation of results.

83. Art. 8(1) CISG encompasses the subjective approach for determining the parties' intention where the other party knew or could not have been unaware of what that intent was, despite the fact that the intent is deemed to be recognized [*Schwenzer 1,* 2012; *Honnold,* 1999]. "Intent does not stand alone: no one party will ever be able to control interpretation. The other party is also needed for this purpose: he must know or must not have been unaware what that intent was..." [*Office Furniture case,* 2006; *Eörsi*, 2004]. CLAIMANT was fully aware of RESPONDENT's intention to receive environmentally sustainable chocolate cakes, which was disregarded by CLAIMANT, contrary to the opposing counsel's submission [*MfC, p. 36, para. 162*].

84. If the subjective intention is not sufficient to detect the real intention of the parties, Art. 8(2) CISG should be applied for this purpose. Such provision states that statements and conduct of a party are to be interpreted in accordance with the understanding of a reasonable person of the same kind.

"This intent must have been known by or, in any case, recognizable to the addressee. If this intent is neither known nor recognizable, then the understanding of a reasonable person in the situation of the addressee is the controlling standard" [*Repair of Bricks case*, 2007; *Schlechtriem*, 1986]. When CLAIMANT made the modifications to the type and the payment terms, it did not object to the standards RESPONDENT had requested for the cakes [*MfC, p. 35, para. 156-157*]. Therefore, the parties' intention was to apply the standards set by RESPONDENT and agreed upon by CLAIMANT [*MfC, p. 37, para. 168*]. Additionally, Ms. Ming, in her witness statement [*R. Exh. R 5, p. 41, para 3*], declared that Mr. Tsai would "largely guarantee compliance", meaning that CLAIMANT would be under an obligation of results.

85. In case of residual doubts on the intention of the parties, Art. 8(3) CISG shall be employed as a parameter, even though CLAIMANT failed to refer to it in its defensive argument. This article lays down the general criteria to interpret the parties' intention, when the principles established in the precedent paragraphs do not make it clear what the parties have agreed upon. "This notion is supposed to objectivize even more than "ought to have known"...it follows from paragraph 1 that in the case of fictitious transactions the real substance is decisive" [*Enderlein & Maskow*, 1992]. CLAIMANT did not explicitly object to any of these contractual clauses nor undertook dissenting conducts. Over the previous years, it always fulfilled its obligation of results as expected under the contract [*MfC, p. 36, para. 164-166*].
86. The same conclusion is reached when applying Art. 4.1 UPICC, which establishes principles of interpretation similar to those enucleated under in the CISG. "Article 4.1 UPICC largely corresponds to Article 8 CISG, that is, an approach to contract interpretation which can best be described as subjective in spirit and objective in practice" [*Rosengren*, 2013]. Art. 4.2 UPICC reiterates the rule of Art. 8(2) CISG whereas Art. 4.3 UPICC sets the same criterion of Art. 8(3) CISG in the sense that, "article 4.3 UPICC also takes the same inclusive approach to relevant background as Article 8(3) CISG, in declaring that regard shall be given to 'all relevant circumstances of the case'. The exemplification of such circumstances includes 'the nature and purpose of the contract', but also preliminary negotiations and the parties' subsequent conduct" [*Rosengren*, 2013].
87. CLAIMANT tied together Art. 4.6 UPICC and the *contra proferentem* rule [*MfC, p. 37, para. 170*], which indicate that, when there is an ambiguity in the contractual text, the contract must be interpreted against the person who drafted it [*Smits*, 2015; *Scally v. Southern Health*, 1992; *The*

Moorcock, 1989; *Shirlaw v. Southern Foundries*, 1940; *Hutton v. Warren*, 1836]. However, in the case at hand the contract was clear in its language. Assuming but not considering that the correspondences and the negotiations were ambiguous, the *contra proferentem* rule is inapplicable.

b) The Conformity of the Cakes Shall Be Evaluated Pursuant to Art. 35 CISG

88. Contrary to CLAIMANT's views [*MfC, p. 35 para. 155*], the parties cannot exclude the application of Art. 35 CISG, as this is a mandatory rule to decide the conformity of the goods in any international contract for the sale of goods [*Schwenzer 2*, 2008]. Art. 35(1) CISG establishes that the seller must deliver goods which conform to the description required under the contract [*Saidov* , 2015; *Henschel 2*, 2004]. "Article 35 has been described as a 'unitary' concept, in that any claim resulting from the delivery of defective goods will have to be based on article 35" [*Maley*, 2009]. The exclusion could apply to Art. 35(2) CISG only. However, the parties did not opt-out of it and, thus, they are bound to such provision [*Frozen Fish case*, 2003; *Wood case*, 2000; *Dividing Wall Panels case*, 1999; *Tannery Machines case*, 1997; *Garden Flowers case, 1994*].
89. In a similar case, "it has been found that a shipment of raw plastic that contained a lower percentage of a particular substance than that specified in the contract, and which as a result produced window blinds that did not effectively shade sunlight, did not conform to the contract, and the seller had therefore breached its obligations" [*CISG Digest*]. Thus, because CLAIMANT did not conform to the contractual requirements, the chocolate cakes were non-conforming [*MfC, p. 39, para. 181-183; p. 40, para. 185*].
90. Furthermore, CLAIMANT's counsel failed to address that the standards his client was supposed to employ in producing the cakes were not fulfilled and, as a consequence, the cakes were not fit for their particular purpose. Indeed, they lack conformity according to Art. 35(2) CISG and in breach of the description agreed upon by the parties [*Red Pepper Powder case*, 2012; *Müller-Chen & Pair*, 2011; *Schwenzer 2*, 2010; *Drukkerij Moderna v. IVA Groep*, 2006; *Crude Yarn case*, 1997].
91. To conclude, it is clear that the parties' intention relies on the goods conforming to the standard set forth in the contract, which means that the environmental standards chosen should have been complied with in order for the goods to be conforming, regardless of CLAIMANT arguing otherwise.

II. Claimant Was Under an Obligation of Results According to Art. 5.1.5 UNIDROIT Principles

92. Both parties are members of GLC; thus, the adherence to such principles shall be scrutinized when it comes to the production of goods. CLAIMANT agreed that the goods would be in accordance to such ethical and environmental standards [*R. Exh. C 1, p. 8*], therefore CLAIMANT's contrary allegations are groundless [*MfC, p. 38, para. 172*].

93. RESPONDENT met all the criteria applicable to the obligation of results as laid down by Art. 5.1.5 UPICC, i.e. the way the obligation was expressed in the contract, the contractual price and other terms of the contract, the risk involved and the ability of the party to influence the performance of the obligation. It has been stated in a similar case that there should be contractual stipulations relating to the exact quality specifications of the goods with supporting evidence, such as correspondences, which clarify the outcome of the goods [*Shirts case*, 1995; *Adamfi v. Alkotók Studiósa*, 1992]. RESPONDENT had established the exact requirements for the chocolate cakes, therefore CLAIMANT was under an obligation to deliver goods under RESPONDENT's requirements as set forth in the contract.

a) Respondent's CSR Principles, Incorporated in Its Standard Conditions, Bound Claimant to Achieve Results

94. RESPONDENT's SC incorporate CSR Principles related to environmentally sustainable production, which CLAIMANT agreed to. "Being socially responsible means not only fulfilling legal expectations but also going beyond compliance and investing more into human capital, the environment and relations with stakeholders...CSR is the integration of business operations and values, whereby the interests of all stakeholders including investors, customers, employees, the community and the environment are reflected in the company's policies and actions" [*Hepburn & Kuuya*, 2011]. The obligation agreed under the contract was to "ensure that its supplier" adhered to ethical production and refrained from dealing with business corruption, which, in the contractual relationship under scrutiny, must be understood as an "enforceable obligation, whose violation becomes sanctioned" [*Schwenzer & Leisinger*, 2007; *Zhu*, 1996; *Flanges case*, 1999; *Steel Channels case*, 1996]. Consequently, CLAIMANT should have produced and delivered chocolate cakes compliant with CSR Principles on environmental sustainability.

b) The High Price Paid by Respondent's Customers Confirm the Nature of the Obligation of Results

95. CSR was incorporated in the contract for a moral purpose, which is the commercialization of environmentally sustainable goods in business enterprises. CLAIMANT not only deceived RESPONDENT, but also its customers, because the price charged was towards the upper end for a premium product in the market segment [*R. PO2, p. 54, Cl. 40*], circumstance denied by CLAIMANT [*MfC, p. 35, para. 154*]. Upon the application of Art. 5.1.5 UPICC, a high price indicates an obligation of specific results as in the case at hand.

c) The Obligation Is of Results Considering the Minimal Risk Involved in Claimant's Performance

96. The auditor appointed by CLAIMANT, Egimus AG, did not verify the certificates because this task was beyond the scope of its expertise [*R. PO2, p. 53, Cl. 33*]. However, CLAIMANT could have easily detected the breach in the ethical production if it only appointed an auditor with proper expertise to investigate such certificates as well as the deforested areas used by the supplier leading to the CCS. Indeed, Art. 5.1.5 UPICC provides that where "the desired result can as a rule be achieved without any special difficulty", the party is under an obligation of results. Appointing an auditor to verify the certificates was not an excessive burden for CLAIMANT and would lead to the fulfillment of its obligation of results. Thus, CLAIMANT's negligence in appointing an auditor able to ensure its suppliers compliance with all the obligations of the CCS layed down to the breach of the contractual provisions [*Schewenzer 1*, 2012; *Nuova Fucinati S.p.A. v. Fondametall International A.B,* 1993].

d) Claimant's Performance Could Not Be Influenced by Respondent

97. Contrary to CLAIMANT's allegations, RESPONDENT had no means of influencing CLAIMANT's performance of its obligation of results [*MfC, p. 36, para. 161*]. In fact, controlling CLAIMANT's performance would require RESPONDENT to be able to physically supply or produce a part of the goods procured by CLAIMANT [*Butler 1*, 2007]. RESPONDENT's mere site visits do not constitute a mean of influence, especially since in the contract there is no clause that determines CLAIMANT's compliance based on RESPONDENT's agreement to the methodology it undertakes.

e) Clause E Code of Conduct for Suppliers Requires Claimant to Comply with the Production Standards Agreed Upon

98. Clause E CCS: Procurement by Supplier [*R. Exh. C 2*, p. 14] states that RESPONDENT's contract necessitated for the goods and services to be procured in a responsible manner through selecting suppliers that will adhere to standards included in its CCS and that the goods and services provided do not breach RESPONDENT's GBP [*MfC, p. 38, para. 175*]. In similar cases, the applicability of uniform standards governs the contractual obligations because the parties agreed upon them [*Crudex Chemicals v. Landmark Chemicals,* 2004; *Old Boxboard Corrugated Carton case*, 1996; *Heliotropin case*, 1994]. CLAIMANT did not object to the standards fixed by RESPONDENT, hence such standards are to be respected in supplying the goods.

99. To conclude, it is understandable that under the CISG and UPICC CLAIMANT was obliged to achieve specific results, regardless of CLAIMANT arguing otherwise.

B. Global Compact Principles Prescribe for Results

100. The GLC lays down ten principles, which help maintain businesses complying with social responsible policies and environmental and sustainable production. The parties must abide by the principles established by this UN agency in order to fulfill the requirements for being members of GLC. "Corporate sustainability starts with a company's value system and a principled approach to doing business. This means operating in ways that...meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption" [*UN Global Compact Principles*]. CLAIMANT disregarded the GLC Principles, which were binding on the parties **(I)**.

I. Global Compact Principles Are Binding Because They Are Part of the Contract

101. CLAIMANT falsely alleged that the GLC Principles do not require an obligation of results, but rather of best efforts [*MfC, p. 38, para. 179*]. However, this conclusion disregards the explicit inclusion of the GLC Principles in RESPONDENT's GC and GBP [*R. Exh. C 2, p. 13; R. PO2, p. 53, Cl. 31*], that gives the GLC Principles the same binding force as other clauses in the agreement [*Poncibò1*, 2017; *Mitkidis,* 2014; *Williams,* 2006]. Indeed, the parties have incorporated the GLC Principles as the standards of quality for the goods [*R. Exh. C 2, p. 11, Art. 2*]. Thus, for CLAIMANT to deliver conforming goods, it should have complied with the GLC Principles, constituting an obligation of results under the contract [*Flechtner*, 2008; *Williams*, 2006; *Organic Barley Case, 2002*].

a) Claimant Did Not Comply with Such Principles

102. CLAIMANT alleged that it had complied with the GLC Principles as they only require the same effort as other companies in the GLC Principles Supply Chain Sustainability report [*MfC, p. 38, para. 173*]. Indeed, this is not true. Such report only highlights the methodology businesses found appropriate for their specific business environment and cannot be applied as a restrictive list of measures, nor the reasonable measures available to businesses due to the various factors of risk each business faces [*Mitkidis*, 2014]. The GLC take a precautionary approach to environmental production under principle 7, which requires businesses to implement proper measures in dealing with environmental challenges [*Butler 2*, 2017; *Ramberg,* 2015]. In a similar case, the court held that a high level of care is required under this approach "If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reasoning for postponing measures to prevent environmental degradation" [*Telstra Corporation Limited v. Hornsby Shire Council,* 2006]. Given that CLAIMANT did not undertake the necessary audit to detect its supplier's fraud, there is no doubt it breached the GLC Principles.

103. To conclude, CLAIMANT was under an obligation to comply with the GLC Principles, since both the parties are members of GLC, hence making the environmentally sustainable production a binding obligation for the parties.

C. Claimant Cannot Argue for Exemption from Liability Due to its Supplier's Misconduct

104. CLAIMANT is liable for its supplier's misconduct, even though it refuses to admit so. According to RESPONDENT's CCS, Clause E: Procurement by Supplier [*R. Exh. C 2, p. 14*], CLAIMANT's suppliers must adhere to the standards set forth in the CCS. Moreover, the *caveat venditor* principle and Art. 35 CISG prescribe that the risk falls under CLAIMANT's sphere of influence **(I)** and, as a consequence, the exclusion of third-party misconduct under the CISG does not apply **(II)**.

I. The *Caveat Venditor* Principle and Art. 35 CISG Prescribe that the Risk of the Performance Falls Under Claimant's Sphere of Influence

105. The *caveat venditor* principle provides that the risk falls under CLAIMANT's sphere of influence. In fact, CLAIMANT is presumed to know more about the characteristics of the goods than RESPONDENT, which paid for the price of the chocolate cakes and is, therefore entitled to receive his part of the bargain as per the parties' agreement [*Schwenzer 1,* 2012; *Henschel 1,* 2005; *Sealy,* 1963;

Pennsylvania Shipping Co v. Compagnie Nationale de Navigation, 1963]. The *caveat venditor* principle is applicable unless the buyer supplies materials for the manufacture of the goods, plays a role in selecting the goods or materials for them, or if the knowledge and skills are superior to the sellers, which is not the case in our dispute. Therefore, CLAIMANT is fully liable for the lack of conformity of the chocolate cakes.

II. The Exemption for Third-Party Misconduct Does Not Apply

106. CLAIMANT is held accountable for its supplier's misconduct, hence, Art. 79 CISG shall not discharge it from liability [*MfC, p. 34, para. 152*]. RESPONDENT clearly stressed that also CLAIMANT's suppliers should adhere to RESPONDENT's CCS [*R. Exh. C 1, p. 8, para. 3*]. Indeed, Art. 79 CISG establishes that a party is not liable for a failure of performance if he proves that the impediment was beyond his control or he could not have expected it. "Article 79 may apply as long as the seller had no knowledge of the prior destruction and could not reasonably have been expected to take the destruction of the goods into account at the time of the conclusion of the contract…sellers have invoked Article 79 to claim exemption from liability for their failure to deliver conforming goods and for late delivery -- but with very limited success" [*CISG AC No. 7*; *Tallon,* 1987]. Moreover, CLAIMANT cannot use the defense of third-party misconduct [*Modular Wall Partitions case,* 2003] because, as stated by an arbitral tribunal in a similar case, "The seller normally bears the risk that its supplier will breach, and that the seller will not generally receive an exemption when its failure to perform was caused by its supplier's default" [*Tribunal of International Commercial Arbitration at the Russian Federation Chamber,* 1998].

107. In conclusion, CLAIMANT cannot argue for an exemption from liability for third-party misconduct, because it should have monitored the supplier in a more diligent and efficient way.

CONCLUSION OF THE FOURTH ISSUE

108. CLAIMANT was under an obligation to achieve specific results, i.e. the delivery of environmentally sustainable chocolate cakes in compliance with GLC Principles. By applying both CISG and UPICC, there are no doubts that the parties agreed upon the achievement of specific results, as well as no doubts are left regarding the breach made by CLAIMANT. In fact, the exemption from liability due to third-party misconduct is not applicable to the case at hand and, accordingly, CLAIMANT

cannot argue that the reason for producing non-conforming chocolates cake is the fraudulent conduct of its supplier.

PRAYER FOR RELIEF

In light of the submissions made above, Counsel for RESPONDENT respectfully requests the Tribunal to find that:

I. The Tribunal shall decide on RESPONDENT's challenge without Mr. Prasad's participation, because it has the authority to do so under the *lex arbitri* and the *lex loci arbitri* [**Issue 1**].

II. Mr. Prasad shall be removed from the Tribunal due to his lack of impartiality and dependence [**Issue 2**].

III. RESPONDENT's Standard Conditions govern the contract in accordance with the CISG and the UNIDROIT Principles [**Issue 3**].

IV. The chocolate cakes delivered by CLAIMANT were non-conforming to the specifications agreed upon by the parties and set forth under RESPONDENT's General Conditions, according to the CISG and the UNIDROIT Principles [**Issue 4**].

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

Amina Abdulla

Noof Janahi

Asya Bukhowa

Omaima AlAbbasi

Eman Alsarraf

Raghad Alotaibi

May Alfadhel

Raneem Kadhem

Riffa, 18 January 2018